

## **Part 4**

### **Appeals**

#### **63G-2-400.5 Definitions.**

As used in this part:

- (1) "Access denial" means a governmental entity's denial, under Subsection 63G-2-204(8) or Section 63G-2-205, in whole or in part, of a record request.
- (2) "Appellate affirmation" means a decision of a chief administrative officer, local appeals board, or records committee affirming an access denial.
- (3) "Interested party" means a person, other than a requester, who is aggrieved by an access denial or an appellate affirmation, whether or not the person participated in proceedings leading to the access denial or appellate affirmation.
- (4) "Local appeals board" means an appeals board established by a political subdivision under Subsection 63G-2-701(5)(c).
- (5) "Record request" means a request for a record under Section 63G-2-204.
- (6) "Records committee appellant" means:
  - (a) a political subdivision that seeks to appeal a decision of a local appeals board to the records committee; or
  - (b) a requester or interested party who seeks to appeal to the records committee a decision affirming an access denial.
- (7) "Requester" means a person who submits a record request to a governmental entity.

Enacted by Chapter 335, 2015 General Session

#### **63G-2-401 Appeal to chief administrative officer -- Notice of the decision of the appeal.**

- (1)
  - (a) A requester or interested party may appeal an access denial to the chief administrative officer of the governmental entity by filing a notice of appeal with the chief administrative officer within 30 days after:
    - (i) the governmental entity sends a notice of denial under Section 63G-2-205, if the governmental entity denies a record request under Subsection 63G-2-205(1); or
    - (ii) the record request is considered denied under Subsection 63G-2-204(8), if that subsection applies.
  - (b) If a governmental entity claims extraordinary circumstances and specifies the date when the records will be available under Subsection 63G-2-204(3), and, if the requester believes the extraordinary circumstances do not exist or that the date specified is unreasonable, the requester may appeal the governmental entity's claim of extraordinary circumstances or date for compliance to the chief administrative officer by filing a notice of appeal with the chief administrative officer within 30 days after notification of a claim of extraordinary circumstances by the governmental entity, despite the lack of a "determination" or its equivalent under Subsection 63G-2-204(8).
- (2) A notice of appeal shall contain:
  - (a) the name, mailing address, and daytime telephone number of the requester or interested party; and
  - (b) the relief sought.
- (3) The requester or interested party may file a short statement of facts, reasons, and legal authority in support of the appeal.

- (4)
- (a) If the appeal involves a record that is the subject of a business confidentiality claim under Section 63G-2-309, the chief administrative officer shall:
    - (i) send notice of the appeal to the business confidentiality claimant within three business days after receiving notice, except that if notice under this section must be given to more than 35 persons, it shall be given as soon as reasonably possible; and
    - (ii) send notice of the business confidentiality claim and the schedule for the chief administrative officer's determination to the requester or interested party within three business days after receiving notice of the appeal.
  - (b) The business confidentiality claimant shall have seven business days after notice is sent by the administrative officer to submit further support for the claim of business confidentiality.
- (5)
- (a) The chief administrative officer shall make a decision on the appeal within:
    - (i) five business days after the chief administrative officer's receipt of the notice of appeal; or
    - (ii) 12 business days after the governmental entity sends the notice of appeal to a person who submitted a claim of business confidentiality.
  - (b)
    - (i) If the chief administrative officer fails to make a decision on an appeal of an access denial within the time specified in Subsection (5)(a), the failure is the equivalent of a decision affirming the access denial.
    - (ii) If the chief administrative officer fails to make a decision on an appeal under Subsection (1)(b) within the time specified in Subsection (5)(a), the failure is the equivalent of a decision affirming the claim of extraordinary circumstances or the reasonableness of the date specified when the records will be available.
  - (c) The provisions of this section notwithstanding, the parties participating in the proceeding may, by agreement, extend the time periods specified in this section.
- (6) Except as provided in Section 63G-2-406, the chief administrative officer may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private under Subsection 63G-2-302(2) or protected under Section 63G-2-305 if the interests favoring access are greater than or equal to the interests favoring restriction of access.
- (7)
- (a) The governmental entity shall send written notice of the chief administrative officer's decision to all participants.
  - (b) If the chief administrative officer's decision is to affirm the access denial in whole or in part, the notice under Subsection (7)(a) shall include:
    - (i) a statement that the requester or interested party has the right to appeal the decision, as provided in Section 63G-2-402, to:
      - (A) the records committee or district court; or
      - (B) the local appeals board, if the governmental entity is a political subdivision and the governmental entity has established a local appeals board;
    - (ii) the time limits for filing an appeal; and
    - (iii) the name and business address of:
      - (A) the executive secretary of the records committee; and
      - (B) the individual designated as the contact individual for the appeals board, if the governmental entity is a political subdivision that has established an appeals board under Subsection 63G-2-701(5)(c).

- (8) A person aggrieved by a governmental entity's classification or designation determination under this chapter, but who is not requesting access to the records, may appeal that determination using the procedures provided in this section. If a nonrequester is the only appellant, the procedures provided in this section shall apply, except that the decision on the appeal shall be made within 30 days after receiving the notice of appeal.
- (9) The duties of the chief administrative officer under this section may be delegated.

Amended by Chapter 335, 2015 General Session

**63G-2-402 Appealing a decision of a chief administrative officer.**

- (1) If the decision of the chief administrative officer of a governmental entity under Section 63G-2-401 is to affirm the denial of a record request, the requester may:
  - (a)
    - (i) appeal the decision to the records committee, as provided in Section 63G-2-403; or
    - (ii) petition for judicial review of the decision in district court, as provided in Section 63G-2-404;or
  - (b) appeal the decision to the local appeals board if:
    - (i) the decision is of a chief administrative officer of a governmental entity that is a political subdivision; and
    - (ii) the political subdivision has established a local appeals board.
- (2) A requester who appeals a chief administrative officer's decision to the records committee or a local appeals board does not lose or waive the right to seek judicial review of the decision of the records committee or local appeals board.
- (3) As provided in Section 63G-2-403, an interested party may appeal to the records committee a chief administrative officer's decision under Section 63G-2-401 affirming an access denial.

Amended by Chapter 335, 2015 General Session

**63G-2-403 Appeals to the records committee.**

- (1)
  - (a) A records committee appellant appeals to the records committee by filing a notice of appeal with the executive secretary of the records committee no later than 30 days after the date of issuance of the decision being appealed.
  - (b) Notwithstanding Subsection (1)(a), a requester may file a notice of appeal with the executive secretary of the records committee no later than 45 days after the day on which the record request is made if:
    - (i) the circumstances described in Subsection 63G-2-401(1)(b) occur; and
    - (ii) the chief administrative officer fails to make a decision under Section 63G-2-401.
- (2) The notice of appeal shall:
  - (a) contain the name, mailing address, and daytime telephone number of the records committee appellant;
  - (b) be accompanied by a copy of the decision being appealed; and
  - (c) state the relief sought.
- (3) The records committee appellant:
  - (a) shall, on the day on which the notice of appeal is filed with the records committee, serve a copy of the notice of appeal on:
    - (i) the governmental entity whose access denial is the subject of the appeal, if the records committee appellant is a requester or interested party; or

- (ii) the requester or interested party who is a party to the local appeals board proceeding that resulted in the decision that the political subdivision is appealing to the records committee, if the records committee appellant is a political subdivision; and
  - (b) may file a short statement of facts, reasons, and legal authority in support of the appeal.
- (4)
- (a) Except as provided in Subsections (4)(b) and (c), no later than seven business days after receiving a notice of appeal, the executive secretary of the records committee shall:
    - (i) schedule a hearing for the records committee to discuss the appeal at the next regularly scheduled committee meeting falling at least 16 days after the date the notice of appeal is filed but no longer than 64 calendar days after the date the notice of appeal was filed except that the records committee may schedule an expedited hearing upon application of the records committee appellant and good cause shown;
    - (ii) send a copy of the notice of hearing to the records committee appellant; and
    - (iii) send a copy of the notice of appeal, supporting statement, and a notice of hearing to:
      - (A) each member of the records committee;
      - (B) the records officer and the chief administrative officer of the governmental entity whose access denial is the subject of the appeal, if the records committee appellant is a requester or interested party;
      - (C) any person who made a business confidentiality claim under Section 63G-2-309 for a record that is the subject of the appeal; and
      - (D) all persons who participated in the proceedings before the governmental entity's chief administrative officer, if the appeal is of the chief administrative officer's decision affirming an access denial.
  - (b)
    - (i) The executive secretary of the records committee may decline to schedule a hearing if the record series that is the subject of the appeal has been found by the committee in a previous hearing involving the same governmental entity to be appropriately classified as private, controlled, or protected.
    - (ii)
      - (A) If the executive secretary of the records committee declines to schedule a hearing, the executive secretary of the records committee shall send a notice to the records committee appellant indicating that the request for hearing has been denied and the reason for the denial.
      - (B) The committee shall make rules to implement this section as provided by Title 63G, Chapter 3, Utah Administrative Rulemaking Act.
  - (c) The executive secretary of the records committee may schedule a hearing on an appeal to the records committee at a regularly scheduled records committee meeting that is later than the period described in Subsection (4)(a)(i) if that records committee meeting is the first regularly scheduled records committee meeting at which there are fewer than 10 appeals scheduled to be heard.
- (5)
- (a) No later than five business days before the hearing, a governmental entity shall submit to the executive secretary of the records committee a written statement of facts, reasons, and legal authority in support of the governmental entity's position.
  - (b) The governmental entity shall send a copy of the written statement by first class mail, postage prepaid, to the requester or interested party involved in the appeal. The executive secretary shall forward a copy of the written statement to each member of the records committee.
- (6)

- (a) No later than 10 business days after the notice of appeal is sent by the executive secretary, a person whose legal interests may be substantially affected by the proceeding may file a request for intervention before the records committee.
  - (b) Any written statement of facts, reasons, and legal authority in support of the intervener's position shall be filed with the request for intervention.
  - (c) The person seeking intervention shall provide copies of the statement described in Subsection (6)(b) to all parties to the proceedings before the records committee.
- (7) The records committee shall hold a hearing within the period of time described in Subsection (4).
- (8) At the hearing, the records committee shall allow the parties to testify, present evidence, and comment on the issues. The records committee may allow other interested persons to comment on the issues.
- (9)
- (a)
    - (i) The records committee:
      - (A) may review the disputed records; and
      - (B) shall review the disputed records, if the committee is weighing the various interests under Subsection (11).
    - (ii) A review of the disputed records under Subsection (9)(a)(i) shall be in camera.
  - (b) Members of the records committee may not disclose any information or record reviewed by the committee in camera unless the disclosure is otherwise authorized by this chapter.
- (10)
- (a) Discovery is prohibited, but the records committee may issue subpoenas or other orders to compel production of necessary evidence.
  - (b) When the subject of a records committee subpoena disobeys or fails to comply with the subpoena, the records committee may file a motion for an order to compel obedience to the subpoena with the district court.
- (c)
- (i) The records committee's review shall be de novo, if the appeal is an appeal from a decision of a chief administrative officer:
    - (A) issued under Section 63G-2-401; or
    - (B) issued by a chief administrative officer of a political subdivision that has not established a local appeals board.
  - (ii) For an appeal from a decision of a local appeals board, the records committee shall review and consider the decision of the local appeals board.
- (11)
- (a) No later than seven business days after the hearing, the records committee shall issue a signed order:
    - (i) granting the relief sought, in whole or in part; or
    - (ii) upholding the governmental entity's access denial, in whole or in part.
  - (b) Except as provided in Section 63G-2-406, the records committee may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private, controlled, or protected if the public interest favoring access is greater than or equal to the interest favoring restriction of access.
  - (c) In making a determination under Subsection (11)(b), the records committee shall consider and, where appropriate, limit the requester's or interested party's use and further disclosure of the record in order to protect:

- (i) privacy interests in the case of a private or controlled record;
  - (ii) business confidentiality interests in the case of a record protected under Subsection 63G-2-305(1), (2), (40)(a)(ii), or (40)(a)(vi); and
  - (iii) privacy interests or the public interest in the case of other protected records.
- (12) The order of the records committee shall include:
- (a) a statement of reasons for the decision, including citations to this chapter, court rule or order, another state statute, federal statute, or federal regulation that governs disclosure of the record, if the citations do not disclose private, controlled, or protected information;
  - (b) a description of the record or portions of the record to which access was ordered or denied, if the description does not disclose private, controlled, or protected information or information exempt from disclosure under Subsection 63G-2-201(3)(b);
  - (c) a statement that any party to the proceeding before the records committee may appeal the records committee's decision to district court; and
  - (d) a brief summary of the appeals process, the time limits for filing an appeal, and a notice that in order to protect its rights on appeal, the party may wish to seek advice from an attorney.
- (13) If the records committee fails to issue a decision within 73 calendar days of the filing of the notice of appeal, that failure is the equivalent of an order denying the appeal. A records committee appellant shall notify the records committee in writing if the records committee appellant considers the appeal denied.
- (14) A party to a proceeding before the records committee may seek judicial review in district court of a records committee order by filing a petition for review of the records committee order as provided in Section 63G-2-404.
- (15)
- (a) Unless a notice of intent to appeal is filed under Subsection (15)(b), each party to the proceeding shall comply with the order of the records committee.
  - (b) If a party disagrees with the order of the records committee, that party may file a notice of intent to appeal the order of the records committee.
  - (c) If the records committee orders the governmental entity to produce a record and no appeal is filed, or if, as a result of the appeal, the governmental entity is required to produce a record, the governmental entity shall:
    - (i) produce the record; and
    - (ii) file a notice of compliance with the records committee.
  - (d)
    - (i) If the governmental entity that is ordered to produce a record fails to file a notice of compliance or a notice of intent to appeal, the records committee may do either or both of the following:
      - (A) impose a civil penalty of up to \$500 for each day of continuing noncompliance; or
      - (B) send written notice of the governmental entity's noncompliance to:
        - (I) the governor for executive branch entities;
        - (II) the Legislative Management Committee for legislative branch entities; and
        - (III) the Judicial Council for judicial branch agencies entities.
    - (ii) In imposing a civil penalty, the records committee shall consider the gravity and circumstances of the violation, including whether the failure to comply was due to neglect or was willful or intentional.

Amended by Chapter 335, 2015 General Session

**63G-2-404 Judicial review.**

- (1)
  - (a) A petition for judicial review of an order or decision, as allowed under this part or in Subsection 63G-2-701(6)(a)(ii), shall be filed no later than 30 days after the date of the order or decision.
  - (b) The records committee is a necessary party to a petition for judicial review of a records committee order.
  - (c) The executive secretary of the records committee shall be served with notice of a petition for judicial review of a records committee order, in accordance with the Utah Rules of Civil Procedure.
- (2) A petition for judicial review is a complaint governed by the Utah Rules of Civil Procedure and shall contain:
  - (a) the petitioner's name and mailing address;
  - (b) a copy of the records committee order from which the appeal is taken, if the petitioner is seeking judicial review of an order of the records committee;
  - (c) the name and mailing address of the governmental entity that issued the initial determination with a copy of that determination;
  - (d) a request for relief specifying the type and extent of relief requested; and
  - (e) a statement of the reasons why the petitioner is entitled to relief.
- (3) If the appeal is based on the denial of access to a protected record based on a claim of business confidentiality, the court shall allow the claimant of business confidentiality to provide to the court the reasons for the claim of business confidentiality.
- (4) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.
- (5) The district court may review the disputed records. The review shall be in camera.
- (6) The court shall:
  - (a) make its decision de novo, but, for a petition seeking judicial review of a records committee order, allow introduction of evidence presented to the records committee;
  - (b) determine all questions of fact and law without a jury; and
  - (c) decide the issue at the earliest practical opportunity.
- (7)
  - (a) Except as provided in Section 63G-2-406, the court may, upon consideration and weighing of the various interests and public policies pertinent to the classification and disclosure or nondisclosure, order the disclosure of information properly classified as private, controlled, or protected if the interest favoring access is greater than or equal to the interest favoring restriction of access.
  - (b) The court shall consider and, where appropriate, limit the requester's use and further disclosure of the record in order to protect privacy interests in the case of private or controlled records, business confidentiality interests in the case of records protected under Subsections 63G-2-305(1) and (2), and privacy interests or the public interest in the case of other protected records.

Amended by Chapter 335, 2015 General Session

**63G-2-405 Confidential treatment of records for which no exemption applies.**

- (1) A court may, on appeal or in a declaratory or other action, order the confidential treatment of records for which no exemption from disclosure applies if:
  - (a) there are compelling interests favoring restriction of access to the record; and

- (b) the interests favoring restriction of access clearly are greater than or equal to the interests favoring access.
- (2) If a governmental entity requests a court to restrict access to a record under this section, the court shall require the governmental entity to pay the reasonable attorney fees incurred by the lead party in opposing the governmental entity's request, if:
  - (a) the court finds that no statutory or constitutional exemption from disclosure could reasonably apply to the record in question; and
  - (b) the court denies confidential treatment under this section.
- (3) This section does not apply to records that are specifically required to be public under statutory provisions outside of this chapter or under Section 63G-2-301, except as provided in Subsection (4).
- (4)
  - (a) Access to drafts and empirical data in drafts may be limited under this section, but the court may consider, in its evaluation of interests favoring restriction of access, only those interests that relate to the underlying information, and not to the deliberative nature of the record.
  - (b) Access to original data in a computer program may be limited under this section, but the court may consider, in its evaluation of interests favoring restriction of access, only those interests that relate to the underlying information, and not to the status of that data as part of a computer program.

Amended by Chapter 377, 2012 General Session

**63G-2-406 Evidentiary standards for release of certain enforcement and litigation records.**

- (1) A record that is classified as protected under Subsection 63G-2-305(10), (17), (18), (23), (24), or (33) may be ordered to be disclosed under the provisions of Subsection 63G-2-401(6), 63G-2-403(11)(b), or 63G-2-404(7)(a) only if the person or party seeking disclosure of the record has established, by a preponderance of the evidence, that the public interest favoring access is equal to or greater than the interest favoring restriction of access.
- (2) A record that is classified as protected under Subsection 63G-2-305(11) may be ordered to be disclosed under the provisions of Subsection 63G-2-401(6), 63G-2-403(11)(b), or 63G-2-404(7) only if the person or party seeking disclosure of the record has established, by clear and convincing evidence, that the public interest favoring access is equal to or greater than the interest favoring restriction of access.

Amended by Chapter 445, 2013 General Session